IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5549

MICHAEL TAYLOR,
Petitioner,

V.

COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF KENTUCKY

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October 10, 1977

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The petitioner, Michael Taylor, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered on July 11, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky affirming petitioner's conviction was filed on April 1, 1977 and is reported as Taylor v. Commonwealth, Ky., App., 551 S.W.2d 813 (1977). The order of the Supreme Court of Kentucky denying discretionary review in petitioner's case was entered on June 29, 1977. The mandate in petitioner's case was entered by the Court of Appeals of Kentucky on July 11, 1977. Copies of the above-mentioned opinion, order and mandate are attached hereto.

JURISDICTION

The opinion of the Court of Appeals of Kentucky was entered on April 1, 1977. Petitioner's timely motion for discretionary review in the Supreme Court of Kentucky was denied on June 29, 1977. The mandate of the Court of Appeals of Kentucky was issued in petitioner's case on July 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether petitioner was unconstitutionally deprived of his right to due process of law by the refusal of the trial court to give an instruction on the presumption of innocence when petitioner's counsel requested and tendered such an instruction?

2. Whether petitioner was denied his constitutional right to due process by the refusal of the trial court to give an instruction on the indictment's lack of evidentiary value when petitioner's counsel requested and tendered such an instruction?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the 14th Amendment to the Federal Constitution.

STATEMENT OF THE CASE

Petitioner, Michael Taylor, was tried in the Circuit Court of Franklin County in Frankfort, Kentucky on the charge of second degree robbery in violation of Kentucky Revised Statute (KRS) 515.030. Contrary to his plea, petitioner was convicted by a jury of the charged offense and sentenced to five years confinement in the penitentiary. Final judgment was entered against petitioner on June 22, 1976. Notice of appeal was filed on June 24, 1976.

On April 1, 1977 the Kentucky Court of Appeals in a published opinion, with one judge dissenting, affirmed the conviction in petitioner's case, but remanded the case to the trial court for a resentencing due to the trial judge's failure to order the statutorily mandatory presentencing investigation.

Petitioner's timely motion for discretionary review was overruled by the Supreme Court of Kentucky on June 29, 1977. Consequently, the Court of Appeals of Kentucky on July 11, 1977 issued the mandate in petitioner's case.

After the jury was selected in the case at bar, the prosecutor presented his opening statement and concluded by reading the indictment to the jury (Transcript of Evidence, hereinafter designated T.E., pp. 13-14). According to the indictment, petitioner on or about February 16, 1976, committed second degree robbery "when, in the course of committing theft, he used physical force upon James Maddox" and "unlawfully took from Mr. Maddox a wallet containing ten ($10) - fifteen ($15) dollars and his house key" (T.R., p. 3). After petitioner's counsel addressed the jury briefly, the Commonwealth presented its case (T.E., pp. 15-16).

In an effort to prove the charged offense, the prosecution called but one witness, James Maddox, the fifty-one year old victim of the alleged robbery, who testified that he had resided in Frankfort for "about sixteen or seventeen years" and had known petitioner "about fifteen years" (T.E., pp. 16-17).

Mr. Maddox related that about 8:15 p.m. on February 16, 1976 petitioner and another man came to his house and knocked on the door. Although petitioner allegedly demanded to be let in, Mr. Maddox refused and both petitioner and his companion left (T.E., p. 18).

Approximately fifteen minutes later, petitioner and his companion allegedly returned and forced their way into Mr. Maddox's home (T.E., pp. 18-19).

After petitioner and "the other boy" allegedly pushed Mr. Maddox to the ground, petitioner took Mr. Maddox's pocketbook and key from his left pocket and both of them "broke off running" (T.E., p. 19).

Mr. Maddox testified that he had "ten to fifteen dollars" in his wallet as well as various papers and a bus ticket (T.E., pp. 19-20).

After the incident occurred, Mr. Maddox called the police and reported the alleged offense. The prosecutor elicited from Mr. Maddox that he had subsequently taken out a warrant against petitioner and "appeared before the Franklin County Grand Jury to seek an indictment" (T.E., p. 20).

Petitioner, the only defense witness, explained that he was twenty years of age and that he resided with his mother and stepfather in Frankfort (T.E., p. 26). He was employed at George's restaurant and had been for six years (T.E., pp. 25-26).

Petitioner denied under oath that he had committed the acts which Mr. Maddox had related on the witness stand (T.E., p. 27). Furthermore, petitioner asserted that he had never struck Mr. Maddox (T.E., p. 27).

Petitioner testified that he had known Mr. Maddox "about three or four years" and had been to his house "several times" (T.E., p. 27).

During an in-chambers hearing on the instructions, petitioner's counsel objected to the trial court's refusal to give to the jury the instructions tendered by the defense (T.E., p. 36). The instructions requested by the defense, but not given by the trial judge, included instructions on the presumption of innocence (Defense Instruction No. 4) and on the indictment's lack of evidentiary value (Defense Instruction No. 5).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW AFFIRMING THE TRIAL JUDGE'S REFUSAL, DESPITE DEFENSE OBJECTION, TO INSTRUCT THE JURY ON THE PRESUMPTION OF INNOCENCE CONFLICTS WITH PREVIOUS DECISIONS OF THE SUPREME COURT.

In the case at bar the prosecution presented only one witness, Mr. Maddox, the victim of the alleged robbery (T.E., pp. 16-25). The prosecution introduced no evidence to corroborate Mr. Maddox's testimony. Similarly, the defense called but one witness, the petitioner (T.E., pp. 26-35). With the evidence in this posture, petitioner's trial counsel requested the trial court to give an instruction on the presumption of innocence and even tendered a proposed instruction (T.E., pp. 36; Defense Instruction No. 4, appended to T.E.).

The trial court refused to give any "presumption of innocence" instruction and instead instructed the jury on the substantive offense of second degree robbery, reasonable doubt, and the necessity of a unanimous verdict (T.E., pp. 37-38).

With the knowledge that the trial court had declined to instruct the jury on "the presumption of innocence," the prosecutor during his closing argument vigorously assailed the "presumption of innocence":

> This defendant, like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today, has this presumption of innocence until proven guilty beyond a reasonable doubt. That's just a presumption on his behalf. . . (T.E., p. 43).

The prosecutor's intentional denigration of the presumption of innocence was obviously calculated to influence the jury to resolve the factual issues against petitioner.

Rejecting the argument that petitioner "was substantially prejudiced by the trial court's failure to instruct on presumption of innocence," the Kentucky Court of Appeals in the instant case observed that "[t]he well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable

doubt an instruction on the presumption of innocence is not necessary." Taylor v. Commonwealth, supra at pp. 813-814. The Court of Appeals of Kentucky concluded, "We find no reason to change the established law on this point." Id. at 814.

The analysis advanced by the Kentucky Court of Appeals in petitioner's case reveals a basic misconception of the importance of the presumption of innocence in a criminal trial in this country.

"The right of a fair trial is a fundamental liberty secured by the Fourteenth Amendment. . . The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, _____U.S._____, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976). Long ago, this Court in Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1985), declared:

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. Id., 156 U.S. at 453, cited with approval in Estelle v. Williams, supra.

In Coffin this Court analyzed the exact issue presented in this petition. In the cited case the trial court refused a presumption of innocence charge, but "it instructed fully on the subject of reasonable doubt." Id., 156 U.S. at 432. Asserting the same contention as that relied upon by the Kentucky appellate court in the case sub judice, the government argued on appeal in Coffin that the reasonable doubt charge obviated the need for an instruction on presumption of innocence. In holding that the refusal to give the requested instruction was reversible error, this Court in Coffin explained:

> The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime. Id., 156 U.S. at 460.

In Coffin, this Court clearly distinguished the presumption of innocence from reasonable doubt. Rejecting the idea that the "presumption of innocence" and "reasonable doubt" are synonymous, this Court observed:

> Concluding, then, that the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf, let us consider what is "reasonable doubt." It is, of necessity, the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them; in other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. Id., 156 U.S. at 460.

Furthermore, Coffin is not an isolated decision by this Court. The requirement of a presumption of innocence charge was specifically reaffirmed in Cochran v. United States, 157 U.S. 286, 15 S.Ct. 628, 39 L.Ed.704 (1895); Agnew v. United States, 165 U.S. 36, 17 S.Ct. 235, 41 L.Ed. 624 (1897); and Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910). In Cochran, supra, at 634, this Court stated:

> In the case under consideration, counsel asked for a specific instruction upon the defendants' presumption of innocence, and we think it should have been given. The Coffin Case is conclusive in this particular, and it results that the judgment of the court below must be reversed, and the case remanded, with instructions to grant a new trial.

While the presumption of innocence is similar to the reasonable doubt standard in reminding the jury that the prosecutor bears the burden of proof, their functions are both clearly

distinguishable and independently necessary. The failure to instruct the jury in the case sub judice on the "constitutionally rooted presumption of innocence" was a clear denial of due process. Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972).

Indeed, this Court, in an opinion by Mr. Justice Rehnquist, in Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973), implicitly stated that anything which would "negate the presumption of innocence" or "dilute," "conflict with," or "'impinge upon' a criminal defendant's presumption of innocence" would be error of constitutional magnitude. Indeed the language of the Cupp opinion leaves no doubt that the jury should be instructed on both the reasonable doubt standard and the presumption of innocence.

As the dissenting opinion of Judge Wilhoit in the instant case explains, the presumption of innocence will lose its value if the trial court fails to inform the jury of this basic constitutional principle. Noting the pragmatic implications of the presumption of innocence instruction, Judge Wilhoit observed:

> There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presumption is likely to be present in their minds. The law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it. Taylor v. Commonwealth, supra at p. 814.

Although acknowledging that "an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do," Judge Wilhoit expressed belief that "there is a subtle distinction between the two instructions and one does not completely perform the job of the other," citing IX J. Wigmore, Evidence § 2511 (3rd ed. 1940). Id. This analysis conforms to this Court's rejection in Coffin, supra, of the idea that the "presumption of innocence" and "reasonable doubt" are synonymous constitutional principles.

These conflicts justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW AFFIRMING THE TRIAL JUDGE'S REFUSAL, DESPITE DEFENSE OBJECTION, TO INSTRUCT THE JURY ON THE PRESUMPTION OF INNOCENCE CONFLICTS WITH THE DECISIONS OF THE HIGHEST COURTS OF NUMEROUS STATES.

Numerous state appellate courts have recognized that the failure of the trial judge to instruct on the presumption of innocence constitutes a constitutional error mandating reversal of the defendant's conviction. For example, the Supreme Court of Appeals of West Virginia has proclaimed that "[i]t is a fundamental right of a defendant to have the jury instructed as to the presumption of innocence and we have repeatedly held it to be reversible error for a trial court to fail to do so." State v. Cokely, W.Va., 226 S.E.2d 40, 43 (1976). Indeed, in Virginia, "[t]he failure of the trial court to adequately instruct the jury on the presumption of innocence when such an instruction is requested is reversible error." Allen v. Commonwealth, Va., 180 S.E.2d 513, 516 (1971); Whaley v. Commonwealth, Va., 200 S.E.2d 556 (1973).

Addressing this same question, the Supreme Court of Colorado, sitting en banc, observed that the "failure to instruct on the presumption of innocence constitutes a denial of due process of law" which "requires that the defendant be granted a new trial." People v. Hill, Colo., 512 P.2d 257, 258-259 (1973).

In Georgia, the failure of a trial judge in a criminal case to instruct the jury on the presumption of innocence is error requiring the grant of a new trial because "[t]his presumption is a fundamental protection afforded an accused and is based upon an established principle of common law." Ealey v. State, 141 Ga. App. 94, 232 S.E.2d 620, 620-621 (1977).

Noting that the presumption of innocence "is a cardinal principle which has special significance in criminal cases because of the nature of these proceedings," the Court of Appeals of New Mexico held "[i]t is error to fail to instruct the jury on the presumption of innocence, if defendant requests an instruction thereon." State v. Henderson, 81 N.M. 270, 466 P.2d 116, 118 (1970).

According to the Florida appellate courts, "any proper understanding of the State's burden of proof in a criminal case must begin with an appreciation of" the presumption of innocence. Reynolds v. State, Fla. App., 332 So.2d 27, 29 (1976). Consequently, the trial judge's failure to instruct completely on the presumption of innocence when requested required reversal of the defendant's conviction. Id.

Recognizing that the presumption of innocence is "fundamental to a fair trial," the Supreme Court of Washington held the complete failure of the trial court to instruct sua sponte on the presumption of innocence constituted reversible error. State v. McHenry, Wash., 558 P.2d 188, 190 (1977).

Because the presumption of innocence is a "cardinal principle" with "special significance in criminal cases," the Supreme Court of Illinois has recognized that "[i]t is error to fail to instruct the jury on this presumption" if requested. People v. Long, 407 Ill. 210, 95 N.E.2d 461, 463 (1950).

The following sampling of cases also support petitioner's contention: People v. McClintic, Mich., 160 N.W. 461 (1916); People v. Leavitt, 301 N.Y. 113, 92 N.E.2d 915 (1950); State v. Stoddard, Mont., 412 P.2d 827 (1966); State v. Coleman, Mon., 460 S.W.2d 719 (1970); Gilleylen v. State, Miss., 255 So.2d 661 (1971); and Taylor v. State, Ala., 272 So.2d 905 (1973).

The contention that instructions relating to reasonable doubt obviate the need for an instruction on presumption of innocence has also been rejected in numerous state courts. For example, in People v. Long, supra, the Supreme Court of Illinois stated:

> The contention that instructions relating to proof of guilt beyond a reasonable doubt, in effect, preform the same function as an instruction as to presumption of innocence, is not supported by the decisions of this court. The cases cited above. . . .establish, in principle, that in the absence of an instruction as to presumption of innocence, instructions relating to reasonable doubt of guilt have the effect of depriving a defendant of his presumption of innocence during the phase of the trial when the jury is considering all the evidence. The latter instructions

> concern a degree of guilt, are not compatible with a presumption of innocence, and therefore, when standing alone, deprive a defendant of the benefit of the presumption of innocence. This is also the generally accepted view of both the Federal courts and the courts of last resort in other jurisdictions. Id., 95 N.E.2d at 463.

Expressing this same rationale, the Supreme Court of Virginia has recognized the "presumption of innocence is 'a landmark of the law' and, as such, is not sufficiently met by a reasonable doubt instruction." Whaley v. Commonwealth, supra, at 558. See State v. Henderson and People v. Hill, both supra.

In the final analysis there is no legal nor logical justification for a trial judge's refusal to give an instruction on the presumption of innocence, when such an instruction is requested. The instruction will neither confuse nor mislead the jury. Instead, the instruction is necessary and fair. Refusal to give this instruction, when requested, is arbitrary and constitutes prejudicial error of constitutional magnitude. In People v. Dornblut, 24 A.2d 639, 262 NYS2d 414 (1965), three of the five justices on the appellate panel concurred in the statement that the presumption might in time vanish if appellate courts did not insist on its use in instructions to the jury.

The conflicts detailed above justify the grant of certiorari to review the state court judgment in this case.

3. THE DECISION BELOW AFFIRMING THE TRIAL JUDGE'S REFUSAL, DESPITE DEFENSE OBJECTION, TO INSTRUCT THE JURY ON THE INDICTMENT'S LACK OF EVIDENTIARY VALUE CONFLICTS WITH PREVIOUS DECISIONS OF FEDERAL COURTS OF APPEAL AND A PRIOR DECISION OF THE SUPREME COURT.

After the jury was sworn, the trial judge, in the presence of the jury, told the prosecutor, "Mr. Corns, you may read the indictment and state your case" (T.E., p. 12). At the conclusion of his brief opening statement, the prosecutor informed the jury as follows:

> It's our duty at this time to read to you the indictment that sets forth the charge. Commonwealth of Kentucky versus Michael Taylor, Indictment Number 7844. The Grand Jury charges on or about the 16th day of February, 1976 in Franklin County, Kentucky, the above-named defendant did commit the offense of robbery in the second degree when in the course of committing theft he used physical force upon James Maddox at the latter's residence, 249 Rosewood, Frankfort, Kentucky, and the defendant unlawfully took from Mr. Maddox a wallet containing ten to fifteen dollars and his house key, against the peace and dignity of the Commonwealth of Kentucky, a True Bill, signed John M. Arnold, Foreman of the March, 1976, Franklin County Grand Jury (T.E., p. 14).

Later, during the prosecutor's questioning of James Maddox, the alleged robbery victim, the following colloquy occurred:

> Q. 35 Did you subsequently take out a warrant against Mike Taylor?
>
> A. Yeah.
>
> Q. 36 And then you later appeared before the Franklin County Grand Jury to seek an indictment?
>
> A. Yes, sir (T.E., pp. 20-21; emphasis supplied).

By informing the jury that Mr. Maddox, the prosecution's only witness, had appeared before the Franklin County Grand Jury to seek an indictment, the prosecutor was able to convey to the jurors that the indictment of petitioner was an

explicit affirmation by the grand jury of the veracity of Mr. Maddox's allegation that petitioner robbed him.

In view of the paucity of evidence against petitioner and the prosecutor's calculated emphasis of the grand jury's decision to indict petitioner on the basis of Mr. Maddox's testimony, petitioner's counsel requested the trial judge to give the following instruction (T.E., p. 36):

> The jury is instructed that an indictment is in no way any evidence against the defendant and no adverse inference can be drawn against the defendant from a finding of the indictment. The indictment is merely a written accusation charging the defendant with the commission of a crime. It has no probative force and carries with it no implication of guilt (Defense Instruction No. 5; appended to T.E., following T.E., p. 50).

However, the trial court declined to give any instruction on the indictment's lack of evidentiary value (T.E., pp. 37-38).

Within the context of petitioner's trial, the defense instruction pertaining to the indictment was necessary to protect petitioner's right to a fair trial. In United States v. Schanerman, 150 F.2d 941 (3rd Cir. 1945), the court, in reversing a conviction for the trial judge's failure to give the jury an instruction on the indictment's lack of evidentiary value, observed:

> It seems settled that, where a correct proposition of law essential to the proper determination of an issue submitted to a jury is incorporated by the defendant into a requested special instruction, which is not given in charge to the jury in substance or in effect or is not covered in the general charge of the court, refusal to give the instruction is reversible error. [Citations omitted.]
>
> When requested so to do, as in the instant case, the district court, in clear, unmistakable words, should have charged the jury that the finding of an indictment is no evidence of the guilt of the accused. Id., at 946.

Other decisions requiring an instruction on the evidentiary value of the indictment include: Little v. United States, 73 F.2d 861, 96 ALR 889 (10th Cir. 1934); Cooper v. United States, 9 F.2d 216 (8th Cir. 1925); Gold v. United States, 102 F.2d 350 (3rd Cir. 1939); and Whittlesey v. United States, D.C., 221 A.2d 86 (1966).

Although the reading of the indictment to the jury is not an improper practice, a defendant in most jurisdictions is entitled, upon request, to an instruction that the indictment is only a formal charge and not evidence of guilt.

In Kroll v. United States, 433 F.2d 1282, 1287 (5th Cir. 1970), the defendant asserted on appeal "that it was error for the trial judge to read the indictment to the jury." The Fifth Circuit Court of Appeals rejected that allegation of error because:

> [t]he trial judge's instructions informed the jury that the indictment was not evidence, that it did not raise a suspicion of guilt, and that it was merely the method by which persons are charged and brought to trial. [Citations omitted.] Id., at 1287.

Similarly, in United States v. Strobe, 431 F.2d 1273, 1275 (6th Cir. 1970), the defendants had moved for a mistrial because, subsequent to the selection of the jury, but prior to the introduction of any evidence, "the [trial] judge had read the indictment to the prospective jurors." Answering this allegation of error, the Sixth Circuit Court of Appeals explained:

> Having at the time of the reading of the indictment, and in the general charge, thoroughly and properly instructed the jury as to the function of the indictment in a criminal case the court was correct in overruling the motion for a mistrial. Id., at 1275.

It is obvious that once the indictment is read to the jury, the defense, upon request, is entitled to an instruction which informs the jury that the indictment has no evidentiary value.

The Kentucky Court of Appeals summarily rejected petitioner's contention that he was substantially prejudiced

by the trial court's failure to instruct on the indictment's lack of evidentiary value, noting that they found "no merit" in petitioner's argument that "failure to give such an instruction denies the defendant due process of the law." Taylor v. Commonwealth, supra, at p. 814.

After acknowledging that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice," this Court in Estelle v. Williams, ____U.S. ____, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976), articulated the methodology by which the presumption of innocence functions to insure no substantial deviation from the constitutionally mandated "fair trial." "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process." Id., 96 S.Ct. at 1693. Reasoning from this premise, this Court concluded, "In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Id., 96 S.Ct. at 1693, citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In the case at bar, the trial court's refusal to instruct the jury, in accordance with the defense request, that "an indictment is in no way any evidence against the defendant," that "no adverse inference can be drawn against the defendant from the finding of the indictment," that the indictment "is merely a written accusation," having "no probative force" and carrying "no implication of guilt," obviously diluted the constitutional principle that guilt must be established by probative evidence beyond a reasonable doubt. In the absence of the requested instruction, the jury was allowed to speculate that the grand jury's indictment was an explicit endorsement of Mr. Maddox's credibility and, hence, further evidence of petitioner's guilt. Under these circumstances, particularly in view of the sparsity of the prosecution's evidence, the trial court's refusal to give the "indictment" instruction was substantial error of constitutional dimension.

These conflicts justify the grant of certiorari to review the judgment below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Kentucky.

Respectfully submitted,

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Michael TAYLOR, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

Court of Appeals of Kentucky.

April 1, 1977.

Discretionary Review Denied June 29, 1977.

Defendant was convicted before the Franklin Circuit Court, Henry Meigs, J., of second-degree robbery, and he appealed. The Court of Appeals, Howard, J., held that refusal to give defendant's requested instruction on presumption of innocence was not error; that failure to instruct on indictment's lack of evidentiary value did not deny defendant due process; that defendant was not entitled to reversal of conviction on basis of prosecutor's unobjected to references to facts which related to defendant's character; but that failure to make a presentencing investigation before defendant was sentenced and failure to consider probation or conditional discharge was error.

Affirmed in part; reversed in part.

Wilhoit, J., dissented and filed opinion.

1. Criminal Law ⇐829(9)

Refusal to give accused's requested instruction on presumption of innocence was not error in prosecution for second-degree robbery, in view of fact that an instruction on reasonable doubt was given. KRS 515.030.

2. Constitutional Law ⇐268(2)

In prosecution for second-degree robbery, failure to instruct on indictment's lack of evidentiary value did not deny accused due process. KRS 515.030.

3. Criminal Law ⇐1037.1(1)

Accused was not entitled to reversal of conviction of second-degree robbery on basis of prosecutor's unobjected to references, during closing argument, to facts which related to accused's character and which had not been placed into evidence, in view of indication that such references did not meet the standard of prejudice of being so apparent and great as to result in a manifest injustice. KRS 515.030.

4. Criminal Law ⇐986

In prosecution for second-degree robbery, failure to make a presentencing investigation before accused was sentenced and failure to consider probation or conditional discharge was error. KRS 515.030, 532.050, 533.010.

J. Vincent Aprile, II, Asst. Public Defender, Frankfort, for appellant.

Guy C. Shearer, Asst. Atty. Gen., Frankfort, for appellee.

Before HAYES, HOWARD and WILHOIT, JJ.

HOWARD, Judge.

Michael Taylor was convicted by a Franklin Circuit Court jury of violating *Ky.Rev. Stat.* Ch. 515.030 (hereinafter KRS), to wit second degree robbery. Evidence was presented that Taylor along with an accomplice went twice to the home of James Maddox on the evening of February 16, 1976. On the second visit when Maddox again would not allow them to enter his home, Taylor hit him and took his wallet and house key. Taylor and Maddox were the only witnesses to testify at the trial. Maddox testified that he had known Taylor for approximately 15 years and was certain he was the person who robbed him. The appellant denied the robbery testifying that he was in a parked automobile with three other persons the entire evening.

[1] Defense counsel tendered and requested that an instruction on presumption of innocence be given to the jury. The trial court refused the request, but gave an instruction on reasonable doubt. The appellant contends that he was substantially prejudiced by the trial court's failure to instruct on presumption of innocence. We find no evidence to support this contention. The well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary. *Mink v. Commonwealth*, 228 Ky. 674, 15 S.W.2d 463 (1926); *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 182 (1942). We find no reason to change the established law on this point.

[2] The second error appellant asserts on appeal is that he was substantially prejudiced by the trial court's failure to instruct on the indictment's lack of evidentiary value. We find no merit in the appellant's argument that failure to give such an instruction denies the defendant due process of the law.

[3] In his closing argument the prosecutor made reference to facts which had not been placed into evidence concerning the defendant's character. While the Kentucky court has held in several cases that such remarks are improper and allowed reversal of the case on that point, the defendant failed to object to these remarks thus not preserving them for appellate review. *Lynch v. Commonwealth*, Ky., 472 S.W.2d 263 (1971). We do not feel that the statements meet the standard of prejudice of being so apparent and great as to result in a manifest injustice as set forth in *Ferguson v. Commonwealth*, Ky., 512 S.W.2d 501 (1974) and *Futrell v. Commonwealth*, Ky., 437 S.W.2d 487 (1969), to allow reversal on the impropriety in the argument despite defendant's failure to object at the proper time.

[4] The appellant contends that no presentencing investigation was made in his case as required by KRS 532.050 before he was sentenced nor was the question of probation or conditional discharge as provided in KRS 533.010 considered. It appears after examining the record that these allegations are correct. The recent Supreme Court case of *Brewer v. Commonwealth*, Ky., —— S.W.2d —— (1977) (24 Ky.Law Summary 1) held that the requirements of KRS 532.050 are mandatory and not within the discretion of the trial court judge. In regard to KRS 533.010 the Supreme Court in *Brewer, supra* stated that this determination by the court is discretionary rather than mandatory but stated that the statute requires that probation or conditional discharge be given consideration.

Therefore, we find no error in the verdict of the jury, but we do find error in the trial court's sentencing procedure. On the latter point, this case is reversed with directions to the Franklin Circuit Court to take appropriate action consistent with this opinion.

HAYES, J., concurs.

WILHOIT, J., dissents.

WILHOIT, Judge, dissenting.

I respectfully dissent from so much of the opinion of the majority as holds that an instruction on the presumption of innocence when requested need not be given by the court because the instruction on reasonable doubt suffices. It strikes me as bordering on the fatuous to say that a jury must be instructed on one of the most basic principles of our criminal law but not the other. The reason given for this anomaly in Kentucky jurisprudence has heretofore been that an instruction on the presumption of innocence is "too favorable to the defendant", *Swango v. Commonwealth*, 291 Ky. 690, 165 S.W.2d 182 (1942). Most of those rights embodied in the modern concept of due process are "favorable to the defendant", but that is their very reason for existence. Not every person charged in a criminal complaint or indicted by a grand jury is guilty of a crime. In recognition of this, our system has built in certain safeguards to protect the innocent. One of these safeguards is the so-called presumption of innocence of a criminal defendant. There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presumption is likely to be present in their minds. The law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it.

While an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do, I believe there is a subtle distinction between the two and one does not completely perform the job of the other. As pointed out by Wigmore, the concept of presumption of innocence "cautions the jury to put away from their minds all of the suspicion that arises from the arrest, the indictment, and the arraignment and to reach their conclusion solely from the legal evidence adduced." He further points out that this caution is "indeed particularly needed in criminal cases". IX J. Wigmore, *Evidence* § 2511 (3d ed. 1940).

I believe the Supreme Court of Kentucky would now reject the old line of cases relied upon by the majority.

Albert THOMPSON et al., Appellants,

v.

KENTUCKY POWER COMPANY, a corporation, Appellee.

Court of Appeals of Kentucky.

April 8, 1977.
Discretionary Review Denied
June 29, 1977.

Appeal was taken from the Lawrence Circuit Court, W. B. Hazelrigg, J., dismissing an attempted appeal to that court from a condemnation judgment entered in the county court. The Court of Appeals, Cooper, J., held that appeal from judgment of county court in condemnation action was not perfected as required by statutes and rules and, hence, was properly dismissed by circuit court where period of eight years which lapsed between time judgment was entered by county court and time original appeal was filed with circuit court was unreasonable, and appellants not only failed to file a copy of judgment with clerk of circuit court within 30 days from date of judgment, but also failed to revive action in name of representative or successor of deceased landowners against whom judgment was taken.

Affirmed.

1. Dismissal and Nonsuit ⇐60(1), 62

Application of rule that a defendant may move for dismissal of an action or of any claim against him for failure of plaintiff to prosecute or to comply with rules or any order of court is a matter that is within discretion of court. CR 41.02.

2. Eminent Domain ⇐257

Strict adherence to procedures set forth in statute for filing an appeal from a judgment authorizing a petitioner to take possession of land or material is required by courts in all condemnation suits. KRS 416.280.

3. Eminent Domain ⇐257

Procedures set forth in statute for taking an appeal from a judgment authorizing a petitioner to take possession of land or material are full and complete and must be followed by landowner. KRS 416.280.

4. Eminent Domain ⇐257

Failure of a landowner to file an appeal bond as required by statute setting forth procedures for taking an appeal from a judgment authorizing a petitioner to take possession of land or material warrants dismissal of appeal. KRS 416.280.

5. Eminent Domain ⇐257

Appeal from judgment of county court in condemnation action was not perfected as required by statutes and rules and, hence, was properly dismissed by circuit court where period of eight years which lapsed between time judgment was entered by county court and time original appeal was filed with circuit court was unreasonable, and appellants not only failed to file a copy of judgment with clerk of circuit court within 30 days from date of judgment, but

COMMONWEALTH OF KENTUCKY

Court of Appeals

MANDATE

MICHAEL TAYLOR

File No. CA-152-MR
VS. Opinion Rendered APRIL 1, 1977

Appeal From FRANKLIN
Circuit Court Action No. IND. #7844

COMMONWEALTH OF KENTUCKY

The Court being sufficiently advised, it seems the judgment herein is erroneous, in part.

It is therefore considered that the judgment be affirmed in part and reversed in part with directions to correct the judgment in conformity with the views expressed in the opinion herein; which is ordered to be certified to said court.

JUNE 29, 1977 - Movant's Discretionary Review denied by the Supreme Court.

A Copy - Attest:

Issued ...July 11, 1977.....

JOHN C. SCOTT, CLERK

CA-7

OPINION RENDERED: April 1, 1977
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

NO. CA-152-MR

MICHAEL TAYLOR — APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, JUDGE
CRIMINAL ACTION NO. 7844

COMMONWEALTH OF KENTUCKY — APPELLEE

AFFIRMING IN PART; REVERSING IN PART

*** * * * * * * * *** * * * * * * * ***

BEFORE: HAYES, HOWARD, and WILHOIT, Judges.

HOWARD, JUDGE. Michael Taylor was convicted by a Franklin Circuit Court jury of violating Ky. Rev. Stat. Ch. 515.030 (hereinafter KRS), to wit second degree robbery. Evidence was presented that Taylor along with an accomplice went twice to the home of James Maddox on the evening of February 16, 1976. On the second visit when Maddox again would not allow them to enter his home, Taylor hit him and took his wallet and house key. Taylor and Maddox were the only witnesses to testify at the trial. Maddox testified that he had known Taylor for approximately 15 years and was certain he was the person who robbed him. The appellant denied the robbery testifying that he was in a parked automobile with three other persons the entire evening.

Defense counsel tendered and requested that an instruction on presumption of innocence be given to the jury. The trial court refused the request, but gave an instruction on reasonable doubt. The appellant contends that he was substantially prejudiced by the trial court's failure to instruct on presumption of innocence. We find no evidence to support this contention. The well established law of Kentucky has been that as long as the trial court instructs the jury on reasonable doubt an instruction on the presumption of innocence is not necessary. Mink v. Commonwealth, 228 Ky. 674, 15 S.W. 2d 463 (1926); Swango v. Commonwealth, 291 Ky. 690, 165 S.W. 2d 182 (1942). We find no reason to change the established law on this point.

The second error appellant asserts on appeal is that he was substantially prejudiced by the trial court's failure to instruct on the indictment's lack of evidentiary value. We find no merit in the appellant's argument that failure to give such an instruction denies the defendant due process of the law.

In his closing argument the prosecutor made reference to facts which had not been placed into evidence concerning the defendant's character. While the Kentucky court has held in several cases that such remarks are improper and allowed reversal of the case on that point, the defendant failed to object to these remarks thus not preserving them for appellate review. Lynch v. Commonwealth, Ky., 472 S.W. 2d 263 (1971). We do not feel that the statements meet the standard of prejudice of being so apparent and great as to result in a manifest injustice as set forth in Ferguson v. Commonwealth, Ky., 512 S.W. 2d 501 (1974) and Futrell v. Commonwealth, Ky., 437 S.W. 2d 487 (1969), to allow reversal on the impropriety in the argument despite defendant's failure to object at the proper time.

The appellant contends that no presentencing investigation was made in his case as required by KRS 532.050 before he was sentenced nor was the question of probation or conditional discharge as provided in KRS 533.010 considered. It appears after examining the record that these allegations are correct. The recent Supreme Court case of Brewer v. Commonwealth, Ky., ____ S.W. 2d ____ (Jan. 14, 1977) (24 Ky. Law Summary 1) held that the requirements of KRS 532.050 are mandatory and not within the discretion of the trial court judge. In regard to KRS 533.010 the Supreme Court in Brewer, supra stated that this determination by the court is discretionary rather than mandatory but stated that the statute requires that probation or conditional discharge be given consideration.

Therefore, we find no error in the verdict of the jury, but we do find error in the trial court's sentencing

procedure. On the latter point, this case is reversed with directions to the Franklin Circuit Court to take appropriate action consistent with this opinion.

Judge Hayes concurring. Judge Wilhoit dissenting.

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Attorney for the Appellee:

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COURT OF APPEALS OF KENTUCKY

CA-152-MR

MICHAEL TAYLOR — APPELLANT

V. — APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE HENRY MEIGS, JUDGE
INDICTMENT NO. 7844

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING

* * * * * *

WILHOIT, JUDGE: I respectfully dissent from so much of the opinion of the majority as holds that an instruction on the presumption of innocence when requested need not be given by the court because the instruction on reasonable doubt suffices. It strikes me as bordering on the fatuous to say that a jury must be instructed on one of the most basic principles of our criminal law but not the other. The reason given for this anomaly in Kentucky jurisprudence has heretofore been that an instruction on the presumption of innocence is "too favorable to the defendant", Swango v. Commonwealth, 291 Ky. 690, 165 S.W.2d 185 (1942). Most of those rights embodied in the modern concept of due process are "favorable to the defendant", but that is their very reason for existence. Not every person charged in a criminal complaint or indicted by a grand jury is guilty of a crime. In recognition of this, our system has built in certain safeguards to protect the innocent. One of these safeguards is the so-called presumption of innocence of a criminal defendant. There is certainly no such presumption in the minds of jurors about to try a case. In fact, by the time the indictment is read to the jurors, the opposite presump' 'on is likely to be present in their minds. The law

builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it.

While an instruction on reasonable doubt does much the same thing that one on the presumption of innocence would do, I believe there is a subtle distinction between the two and one does not completely perform the job of the other. As pointed out by Wigmore, the concept of presumption of innocence "cautions the jury to put away from their minds all of the suspicion that arises from the arrest, the indictment, and the arraignment and to reach their conclusion solely from the legal evidence adduced." He further points out that this caution is "indeed particularly needed in criminal cases". IX J. Wigmore, Evidence § 2511 (3d ed. 1940).

I believe the Supreme Court of Kentucky would now reject the old line of cases relied upon by the majority.

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Attorney for Appellee:

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John C. Scott
Clerk

OFFICE OF
CLERK OF COURT OF APPEALS
FRANKFORT, KENTUCKY 40601

U.S. 127 Twilight Trail
564-7920

CERTIFICATION

I, Jeanette Trusty, do hereby certify that the foregoing Opinion Affirming in Part and Reversing in Part, rendered April 1, 1977; and Mandate issued July 11, 1977, in the case of Michael Taylor vs. Commonwealth of Kentucky, are true and correct copies as same appear on file in my office.

Done this 16th day of September, 1977, at Frankfort, Kentucky.

Jeanette Trusty

Jeanette Trusty, Deputy Clerk
Court of Appeals of Kentucky

SUPREME COURT OF KENTUCKY
SC-249-D

MICHAEL TAYLOR — MOVANT

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING MOTION TO SUPPLEMENT RECORD AND ORDER DENYING DISCRETIONARY REVIEW

The motion of the Commonwealth of Kentucky that it be permitted to supplement the record in this proceeding is denied.

The motion of Michael Taylor for a review of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED June 29, 1977.

Chief Justice

MARTHA LAYNE COLLINS
CLERK

OFFICE OF THE CLERK
SUPREME COURT OF KENTUCKY
STATE CAPITOL, FRANKFORT, 40601

ROOM 209
(502) 564-4720

I, Martha Layne Collins, Clerk of the Supreme Court of Kentucky, do hereby certify that the attached Order entered by the Court on June 29, 1977, in the case of Michael Taylor vs. Commonwealth of Kentucky, File No. SC-249-D, is a true and correct copy as it appears on file in my office.

Done this 16th day of September, 1977, at Frankfort, Kentucky.

Martha Layne Collins
Clerk